

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 16.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.225 of 1993

1. Somu Asari (died)
2. M.Kalyani
3. M.Soundaram
4. B.Sournavalli
5. T.Shanmugavalli
6. S.A.Manikandan

Appellants 2 to 6 brought on record as LRs. of the deceased sole appellant vide order of court dated 19.01.2006 made in C.M.P.No.17006 to 17008 of 2005

... Appellants

Vs.

R.Varadarajan

... Respondent

PRAYER: First Appeal preferred under section 96 of CPC against the Judgment and decree of the learned Principal Subordinate Judge, Coimbatore in O.S.No.589 of 1987 dated 22.09.1992.

For Appellants : M/s. Pushpa Sathyanarayanan
For M/s.T.R.Rajaraman

For Respondent : Mr.G.Narasimulu

सत्यमेव जयते
J U D G M E N T

The defendant in the Trial Court is the appellant. Pending the First Appeal the appellant died and his legal representatives were brought on record as appellants 2 to 6. The plaintiff who is the respondent herein has filed the suit for specific performance of the agreement dated 06.09.1986 for a direction against the sole defendant to execute and register sale deed in respect of the suit property which is the house site as per the approved layout in No.62 in Sowripalayam Village, Coimbatore District to the extent of 6 cents 166 sq.ft. or 2780 sq.ft. measuring East to West on both side 40 ft. North to South on the Eastern side 70 ft. and North to South on Western side 69 ft. along with the use of the road as per the layout.

2. The case of the plaintiff is that the defendant Somu Asari, who is the owner of the property offered to sell the vacant site to the plaintiff and the plaintiff agreed to purchase the same for Rs.41,000/- and accordingly a sale agreement was entered on 06.09.1986. At the time of entering the agreement the plaintiff had paid an advance amount of Rs.5,000/- towards part sale consideration and he has always been ready to pay the balance sale consideration. The terms of the agreement contemplate that in the event of the failure of the defendant to complete the sale and deliver possession, the plaintiff was entitled to get the same completed by due process of law.

3. It is the case of the plaintiff that the defendant has received a further amount of Rs.2,000/- on 12.09.1986 and another amount of Rs.10,000/- on 23.10.1986 apart from the original advance amount paid on the date of the agreement. It is also the case of the plaintiff that on 23.10.1986 the defendant has handed over the original title deed and encumbrance certificate for the period from 01.01.1970 to 01.03.1982 and another for 1986 promising to furnish further encumbrance certificate. It is also the plaintiff's case that the defendant had agreed to extend the time for completion of sale in the auspicious month of *rpj;jpiu* after Tamil New Year. The plaintiff has also deposited the balance sale consideration of Rs.22,000/- into court and filed the suit for specific performance.

4. The case of the defendant in the written statement was that the said agreement also contains a clause for forfeiture of advance amount and the agreement states that the performance should be completed within 6 months time, further, stating that if not, the advance paid by the plaintiff will be forfeited. According to the defendant, since the time granted under the agreement dated 06.09.1986, namely, six months expired, the defendant at the earliest point of time has issued a notice on 25.03.1987 stating that the agreement stood cancelled. It is the case of the defendant that it is only after the defendant issued a notice on 25.03.1987, by reply notice dated 27.03.1987 the plaintiff has come forward with a new story and by that time the agreement stood cancelled. In fact the defendant had issued a reply notice dated 29.04.1987 stating that he had already handed over original title deeds and encumbrance certificate to the plaintiff. The defendant also denied that he had agreed to extend the time on 23.10.1986 till the auspicious month of *rpj;jpiu* after Tamil New Year.

5. According to the defendant, since the plaintiff has failed to perform his part of obligation the agreement has come to an end and the amount of advance paid is forfeited to the defendant as per the recitals of the agreement. It is with the above pleadings the parties have proceeded with the trial. The plaintiff having been

examined as P.W.1 and on his side 11 documents were marked as Ex.A.1 to A.11 and on the defendant's side the defendant was examined as D.W.1 apart from another witness S.Balasubramanian as D.W.2 and marking three documents as Ex.B.1 to B.3. The Trial Court has framed the following issues for consideration

- 1) Whether time is the essence of contract under the agreement dated 06.09.1986?
- 2) Whether the agreement stood cancelled as stated by the defendant?
- 3) Whether the plaintiff was always ready and willing to perform his part of obligation under the sale agreement?
- 4) Whether the plaintiff is entitled for decree for specific performance? and
- 5) To what relief?

The sale agreement dated 06.09.1986 the execution of which has been agreed by both the plaintiffs and defendant was marked as Ex.A.1.

6. On analysis of the entire evidence, the learned Trial Judge has decreed the suit for specific performance as against which the defendant has filed the present First Appeal. As stated earlier pending First Appeal the defendant who is the appellant died and his legal representatives are appellants 2 to 6. The point for consideration in this appeal is whether the judgement and decree passed by the Trial Court in granting decree for specific performance is in accordance with law? The fact that the suit property belonged to the defendant and the defendant had agreed to sell the suit property to the plaintiff for a sale consideration of Rs.41,000/- and there was a sale agreement entered between the plaintiff and defendant on 06.09.1986 marked as Ex.A.1 and the fact that the defendant has received an advance amount of Rs.5,000/- on the date of the agreement, namely, 06.09.1986 and subsequently the defendant had received further amount of Rs.2,000/- on 12.09.1986 and made an endorsement in Ex.A.1, marked as Ex.A.2 and the defendant had received a further amount of Rs.10,000/- from the plaintiff on 23.10.1986 and made an endorsement under Ex.A.1 marked as Ex.A.3 are all admitted.

7. It is also not in dispute that Ex.A.1 sale agreement states that the agreement shall be in effect for a period of six months and the defendant had specifically stated that the plaintiff had to pay the balance amount of sale consideration within a period of six months and obtain the sale deed executed by the defendant in the name of the plaintiff or the nominee of the plaintiff. It is also on record as it is stated by the plaintiff as P.W.1 that the balance sale consideration of Rs.24,000/- was paid by him in the court while filing the suit for specific performance. It is also not in dispute that at the time a further advance amount of Rs.10,000/- was paid on 23.10.1986 by making endorsement in Ex.A.3, the defendant has handed over the parent document in respect of the suit property apart from

encumbrance certificates. The case of the defendant is that in spite of the fact that he has been ready and willing to perform his part of obligation, the plaintiff has not chosen to pay the balance consideration within the period of six months as per the sale agreement and therefore, immediately on completion of the six months period contained in Ex.A.1, he has issued a notice to the plaintiff on 25.03.1987 marked as Ex.A.4 stating that by virtue of the lapse of time and by the failure of the plaintiff the agreement stands cancelled, since the time is the essence of contract as per Ex.A.1 and therefore, stated that the advance amount paid by the plaintiff stood forfeited in his favour.

8. Thereafter, it is seen that the plaintiff has given a reply to the said Ex.A.4 notice through his counsel on 27.03.1987 marked as Ex.A.5 in which he has stated that the six months period fixed in Ex.A.1 sale agreement was only tentative and therefore in effect time was not the essence of agreement and also stating that the defendant has agreed to complete the sale transaction early in rpj;jpiu after Tamil New Year, namely, after 14.04.1987 and it was only agreeing to the said suggestion the plaintiff has paid the second advance amount of Rs.10,000/- on 23.10.1986. The plaintiff in the said reply notice marked as Ex.A.5 has chosen to find fault with the defendant relating to his notice dated 25.03.1987 marked as Ex.A.4 in which the defendant has chosen to state as if the plaintiff has paid only Rs.5,000/- as advance by suppressing the subsequent amounts of Rs.2,000/- paid on 12.09.1986 and Rs.10,000/- paid on 23.10.1986. In the said notice the plaintiff has also stated that he has also been ready and willing to pay the balance sale consideration of Rs.24,000/- on an early auspicious day after first சித்திரை. Of course to this reply notice Ex.A.5, the defendant has given another notice dated 08.04.1987 marked as Ex.A.6 stating that within few days from the date of Ex.A.1 sale agreement the defendant had to get two further advance amount from the plaintiff because he was in dire need of money and he has never agreed to extend the period upto சித்திரை 1987 since the very purpose of the sale agreement was that he needed money immediately.

9. It is also seen under Ex.B.1 letter by the plaintiff dated 15.04.1987 to the defendant stating that he was making arrangement for purchase of the requesting stamp papers for preparation of sale deed and defendant was requested to furnish encumbrance certificate from 1982 - April 1987 and income tax clearance certificate stating that the balance of sale consideration will be paid at the time of registration. To this letter of the plaintiff also the defendant has issued a reply legal notice on 29.04.1987 marked as Ex.B.2 reiterating that the agreement stood cancelled and directing the plaintiff to return the original title deed and the encumbrance certificates. Ultimately the suit came to be filed on 18.06.1987.

In respect of the issues relating to the time as to whether the same is the essence of contract under Ex.A.1, the learned Trial Judge on appreciation of the endorsement made under Ex.A.2 and A.3, namely, the subsequent two advance amounts received by the defendant and relying upon the judgement of the Hon'ble Supreme Court reported AIR 1977 SC 1005 has come to the conclusion that as per Ex.A.1 time is not essence of contract. The Trial Court has also accepted the version of the plaintiff that the defendant has agreed to extend the period for execution of sale after Chitrai month namely, after 14.04.1987 and also held that time is not the essence of contract.

10. A reference to the judgement of the Trial Court shows that not only the learned Trial Judge has accepted the version of the plaintiff that the defendant has agreed to extend the time beyond the period of six months mentioned in Ex.A.1 sale agreement and also due to the reason that the defendant has chosen to receive two further advances from the plaintiff on 12.09.1986 and 23.10.1986 and therefore, the defendant has not considered the time as essence of contract and accordingly concluded the case in favour of the plaintiff. While it is true that as considered by the learned Trial Judge relying upon the judgement of the Hon'ble Supreme Court reported in AIR 1977 SC 1005 that normally in cases of contract of sale of immovable property the presumption is that the time is not the essence of contract simply because a term is stated about the period within which the performance should be completed but it remains a fact that the essential nature of time is to be considered based on the facts and circumstances of the case.

11. It is no doubt true that the learned Trial Judge has taken Ex.A.2 and A.3 under which the defendant has received two further advances and therefore, it should be taken that the parties have agreed that the time is not the essence of contract forgetting the fact that as per the Ex.A.1 sale agreement which was entered on 06.09.1986 six months period was given for performance of contract which should expire on 05.03.1987 and merely because within the period of six months the defendant has received the said two advance amounts on 12.09.1986 and 23.10.1986 it cannot be presumed that the parties have agreed that the time is not essence of contract. The basic fact which has to be considered as to whether the time is essence of contract under the agreement is based on the consequential loss caused to a party in respect of his obligation towards the third parties by virtue non performance of the previous contract in time, which resulted in substantial loss and that has to be taken into consideration to decide as to whether time is essence of contract. For instance in cases where a person agree to sell his property with a desire to invest the sale consideration in some other profitable avenue which depends upon the payment within a stipulated period and that could not be carried out due to the failure of the party in making payment and completing sale in time

may be a instance were the parties intended the time as essence of contract, since the time of performance is taken as a basis for some other obligation. This was squarely the view taken by this Court in *Indravathi Vs. Kamala* reported in 2000(IV) CTC 278, as rightly submitted by the learned counsel for the appellant, in that case this Court has not only held that the time is the essence of contract depending upon the conduct of the parties and consequences of such contracts but also while dealing with readiness and willingness it was held that merely having readiness or means to pay is not sufficient unless it is coupled with a desire to pay and if person is having sufficient means but still having no desire, even for a single day it cannot be treated as if he was "ready and willing", for, the law contemplates readiness and willingness in combination and not in isolation. The findings of this Court in the above said judgement are as follows:

"35. It has already been seen that time was agreed to be an essence of the contract and since a specific deed had been agreed upon for the payment of the third instalments, the respondent ought to have complied with that condition without any default. The respondent has not only committed default in payment of third instalment but it is also evident that she was not ready and willing to pay the sum of Rs.20,000. To cover up for the absence of readiness and willingness atleast four versions have been given regarding the payment of this amount. No acceptable reason is given for the non-payment of the third instalment on the other hand inconsistent versions are offered in the pleadings and the oral evidence. A suitor who comes to court with mutually conflicting versions in the pleadings and evidence cannot claim or obtain an equitable remedy. It is the duty of the persons seeking specific performance to make payments on the dates agreed upon and when the respondent has not made proper tender on 15.12.1979, the Trial court ought not to have taken notice of the absence of any reference in non-payment in Ex.A.6. There is a clear reference in Ex.A.3, dated 09.02.1980 that the third instalment was not paid. In any event, the purchaser ought to pay the instalments as per the agreement. The respondent has failed to pay the instalment and to prove the readiness and willingness to comply with the payment schedule as per Ex.A.1.

37. As held in *Vasatha Vs. M.Senguttuvan*, 1997(2) MLJ 576: 1997 (2) LW 820, referred to above "even if for a single day, the plaintiff is not ready to take the sale deed specific performance cannot be ordered." Readiness and willingness should be there continuously

from the date of agreement till date of suit. No acceptable reason has been given by the respondent as to why the second instalment and the third instalment were not properly paid on the stipulated dates and why the balance of Rs.60,000 was not offered on 31.01.1980. Time was clearly agreed to be the essence of the contract and the P.W.1 also admits it to be so. The respondent who has failed to prove readiness and willingness cannot claim specific performance.

38. From the various decisions referred to above, it is clear that there cannot be a sweeping conclusion in contracts relating to immovable property that time cannot be said to be essence of the contract. It depends upon the consensus between the parties to the contract. The decision reports in K.S.Vidyanandam Vs. Vairavan, J.T 1997(2) SC 375 is clearly applicable. Specific performance cannot be ordered merely because they are filed within the period of limitation, especially where time limits have been stipulated in the agreement for performance of certain obligations. To disregard the time stipulation would amount to ignoring the understanding between the parties as though it is of no significance or value."

12. It is true that as held by the Hon'ble Supreme Court in Ramesh Chandra Chandiook and another Vs. Chuni Lal Sabharwal (dead) by his legal representatives and others reported AIR 1971 SC 1238, that "readiness and willingness" cannot be treated as a straightjacket formula. These have to be determined on the entirety of facts and circumstances relating to the intention and conduct of the parties concerned. It is in the light of the above said dictum even though the reasoning given by the learned Trial Judge in favour of the plaintiff based on Ex.A.2 and A.3 which cannot be sound, the learned Trial Judge in fact has considered the evidence of the defendant as D.W.1 who has stated that it was due to the fact that the plaintiff has not performed his obligation within the stipulated time under Ex.A.1, he had to incur Rs.50,000/- loss based on a breach of another agreement relied upon by him under Ex.B.3. The Trial Court has considered the contents of Ex.B.3 relied upon by the defendant and found on fact that the said agreement Ex.B.3 has nothing to do with the defendant at all and Ex.B.3 contains the defendant's signature only as a witness and he was not a party to the said agreement and therefore, has specifically come to the conclusion on appreciation of Ex.B.3 that by non performance of the plaintiff under Ex.A.1 the defendant has not incurred any loss. This reasoning given by the learned Trial Judge based on the proper appreciation of evidence would show that the case of the defendant that he had to fail in respect of his

obligation with the third parties due to the non performance of the plaintiff under Ex.A.1 is not only false and concocted but created for the purpose of the case.

13. There is one other situation in this case, the defendant having received the two advances from the plaintiff on 12.09.1986 and 23.10.1986 which are admittedly paid by the plaintiff readily without hesitation, has not chosen to make his claim for the balance amount immediately on the verge of the expiry of six months time which expired as per Ex.A.1 on 05.03.1987 and it was only after 20 days on 25.03.1987 he has chosen to hurriedly give a notice under Ex.A.4 cancelling the agreement for which the plaintiff has immediately given a reply under Ex.A.5 on 27.03.1987 stating that he has always been ready and willing to pay the balance amount and it shows the capability of payment of money at any time. He has also filed various documents Ex.A.7 to A.11 which shows that the plaintiff is a civil contractor and he has in fact entered an agreement with the Government of India as seen under Ex.A.8 to the extent of Rs.5,00,000/- and in such circumstances there is absolutely no difficulty to come to the conclusion that the plaintiff was having capability to pay the amounts but as far as his willingness is concerned admittedly, at the time of filing of the suit he has deposited the entire amount to the court and his stand that the defendant has agreed to wait the advent of சித்திரை month since it happened to be the auspicious month. I do not think that even assuming that the defendant has not accepted to extend till சித்திரை month for payment of the balance sale consideration and execution of sale deed, asking for an auspicious day can be termed as any blemish on the part of the plaintiff who is seeking an equitable remedy of specific performance for purchase of a property which is certainly a significant event in the material human life of any person.

14. On the other hand, as it is rightly pointed out by the learned Trial Judge, the conduct of the defendant in setting up a false plea as if he was affected monetarily by non performance of plaintiff under Ex.A.1 was found to be false on material fact throwing certainly a blemish on the conduct of the defendant, who is also equally expected to act in utmost good faith, since the concept of equity is applicable to both the parties. While dealing with the readiness and willingness and blemishness on the parties conduct the Supreme Court in Aniglase Yohannan Vs. Ramlatha and others reported in 2005(7) SCC 534 has held in the following words:

"11. Lord Campbell in Cort Vs. Ambergate, Nottingham and Boston and Eastern Junction Rly. Co. observed that in common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the

plaintiffs, and that they were disposed and able to complete it, had it not been renounced by the defendant.

12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

13. Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. On considering almost an identical fact situation it was held by this Court in Surya Narain Upadhyaya Vs. Ram Roop Pandey that the plaintiff had substantiated his plea."

15. Applying the said dictum to the facts and circumstances of this case, I am of the considered view that the time is not the essence of contract under Ex.A.1 and the plaintiff has always been ready and willing to perform his part of obligation as correctly found by the learned Trial Judge with proper reason and appreciation of evidence and therefore, there is nothing to be interfered with the judgement and decree of the Court below. With the result judgement and decree of the Trial Court is confirmed and the first appeal stands dismissed with cost.

nbg

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1. The Principal Subordinate Judge, Coimbatore.

2. The Record Keeper,
VR Section, High Court, Madras.

+ 1 cc to Mr. T. R. Rajaraman, Advocate SR No. 24936

RS (CO)
SR/31.5.2007

Order in
A.S.No.225 of 1993



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